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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 361

E. G. ROBINSON, JR., trading as PALMETTO BROADCASTING COMPANY (WDKD),

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES A. MCKENNA, JR.
VERNON E. WILKINSON
MCKENNA & WILKINSON
1735 DeSales Street, N. W.
Washington, D. C.
20036

Counsel for Petitioner

WILSON - EPES PRINTING CO * RE 7-6002 - WASHINGTON 1 D. C.

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Opinions Below

The decision of the Federal Communications Commission (J. A. 288-302), affirmed on appeal to the court below, is reported at 33 FCC 250 (1962). The joint and individual opinions filed by four judges of the court below have not yet been reported officially, and are printed as an appendix hereto.

Jurisdiction

The judgment of the court of appeals was entered on March 19, 1964. A petition for reconsideration and for an en banc hearing was denied on May 7 and May 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Whether action by the Federal Communications Commission delving into program content and terminating a broadcast station's operating authority because of broadcasts which that agency found to be "offensive", and "thus contrary to the public interest", impinges upon the free speech guarantees of the First Amendment and the no-censorship prohibitions of Section 326 of the Communications Act—in those situations where the Commission can point to no statutory standard more specific or substantive than "public interest, convenience, and necessity".

2. Whether, if the Commission's foray into program content under a broad "public interest" standard impinges on First Amendment freedoms, the alternative reason given by the Commission for terminating WDKD's operating authority (alleged misstatements by the licensee) should, under the facts here present, be allowed to stand.

Statutes Involved

The First Amendment to the U. S. Constitution states in pertinent part that:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

Sections 307 (a) and 326 of the Communications Act of 1934, as amended (47 U.S.C. Secs. 307 (a) and 326) provide:

> Sec. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.
>
> • • • •
>
> Sec. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censor-

ship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Statement

Petitioner, E. G. Robinson, Jr., trading as Palmetto Broadcasting Company, is the licensee of Station WDKD, a daytime-only station and the only broadcast facility licensed to Kingstree, S. C. In addition to serving Kingstree, a town of 3800 people, WDKD serves a number of other small towns in Williamsburg and adjoining counties in South Carolina, an area which is largely agricultural, with a population which is predominantly Negro (WDKD Ex. 2, J. A. 5; J. A. 242).

From the time WDKD went on the air in 1949 until matters giving rise to the present litigation occurred in 1960, except for a couple of years in the armed services during the Korean conflict, one Charlie Walker was a disc jockey on Station WDKD (J. A. 332, 393). He had three shows each week day—a two-hour show at sign-on, an hour show around noon, and an hour show shortly before sign-off, consisting of musical recordings interspersed with patter and spot announcements (J. A. 332).

In the '40's and throughout the '50's, WDKD's license was regularly renewed by the Commission—no complaints, no questions, no problems. However, in April of 1960, with WDKD's then current license due to expire December 1, 1960, a competing broadcast station (WJOT) in Lake City, S. C. hand-delivered to the Commission in Washington six tapes which purported to be off-the-air recordings of certain shows, or portions thereof exclusive of music, broadcast over WDKD by Charlie Walker (cf. Fdg. 36, J. A. 232).

On May 11, 1960, the Commission wrote Robinson and (without divulging the dates, source, or precise contents)

stated that it had in its possession tape recordings of several of Walker's broadcasts, and that some of the material on Walker's shows was "vulgar and suggestive" (WDKD Ex. 3, J. A. 9). After noting that it was the Commission's practice to associate complaints with the files of the station involved and to afford the licensee "an opportunity to submit a statement with respect thereto", for which reason "this matter is being brought to your attention", Robinson was requested to submit a statement "with respect to this matter" (WDKD Ex. 3, J. A. 9).

Upon receiving this letter, Robinson talked to Walker, who denied knowledge of having broadcast any "vulgar or suggestive" material over WDKD (J. A. 11; J. A. 336). Petitioner then telephoned his Washington attorneys, Daly & Ehrig. Mrs. Ehrig asked to hear the tapes and to be apprised of their dates and source. The Commission's Broadcast Bureau refused (J. A. 10). Following a formal demand for permission to hear the tapes so that WDKD could reply to the May 11 letter (WDKD Ex. 4, J. A. 10-11), the Bureau some three weeks later (on June 8, 1960) allowed Mrs. Ehrig to listen to excerpts from some of the tapes and to make notes thereon, whereupon she advised Robinson by letter that certain items which she had heard (eight in number which she there quoted) were improper, that Walker should be discharged, and that steps should be taken to prevent any recurrences (WDKD Ex. 5, J. A. 11-12).

Two days thereafter (June 10, 1960), in a letter prepared with the assistance of his local attorney (J. A. 340, 347), Robinson advised the Commission that he had received from his Washington counsel "several quotations from the taped shows" (the eight items listed in her letter of June 8), that "*these* statements made by my employee, Charlie Walker, were not known to me", that until receiving the June 8 letter he was not acquainted "with the nature of the statements made by Charlie Walker", that

immediately upon learning of "these statements" that he had discharged Walker, and that procedures had been established to avoid any recurrences (WDKD Ex. 6, J. A. 13; cf. WDKD Ex. 7, J. A. 14).

With compliance thus effected by the licensee after he was forewarned for the first time,[1] the Commission did not at that juncture attempt to institute revocation proceedings—where it would have had the burden of proof and the burden of proceeding (47 U.S.C. Sec. 312(d)). The Commission waited instead until after Robinson had filed for renewal, whereupon (on March 21, 1961) it designated WDKD's renewal for hearing on four factual issues (J. A. 215): (1) Whether the licensee in statements theretofore made about Walker's broadcasts had misrepresented certain facts to the Commission; (2) whether in allowing such broadcasts he had failed to maintain adequate control over his station; (3) whether any program material on Walker's shows was "coarse, vulgar, suggestive and susceptible of indecent, double meaning"; and (4) whether WDKD's programming in general has met the needs of the area and the population it serves.

The hearing was held in Kingstree in late May-early June of 1961 before an Examiner—with 18 witnesses called by the licensee, and 10 by the Commission's Broadcast Bureau. Nine resolutions, signed by some 65 civic, governmental, religious, and other leaders of Kingstree and neighboring communities, urging renewal of WDKD's license, were duly received in evidence (WDKD Ex. 12-20, J. A. 187-197).

[1] Congress has provided that in most situations a license shall not be revoked unless a licensee has been forewarned and accorded an opportunity to achieve compliance, i.e. given "another chance." Section 9 (b) of the Administrative Procedure Act (5 U.S.C. Sec. 1008 (b)); *Attorney General's Manual on the Administrative Procedure Act* (1947), p. 91; Section 312 (a) (5) of the Communications Act (47 U.S.C. Sec. 312 (a) (5)).

In an Initial Decision released December 12, 1961 (33 FCC 265, J. A. 214-287), the Examiner held that "the pivotal issue in this case is issue three" (Concl. 1, J. A. 264). He then proceeded to equate "obscenity", as used in 18 U.S.C. Sec. 1464, with "coarse and vulgar", as used by the Commission in Issue 3, and concluded that some of Walker's broadcasts were "obscene and indecent" on their face, and *a fortiori* "coarse and vulgar" (J.A. 266, 273-274). Despite findings generally adverse to Robinson, the Examiner was nevertheless of the opinion that the question of what to do with WDKD's renewal was a "close one" (Concl. 25, J. A. 284): (1) Because Robinson had not been forewarned and accorded "another chance" (see 5 U.S.C. Sec. 1008(b)); (2) because Robinson was a respected leader in his community; (3) because Robinson would not again (the Examiner felt sure) allow objectionable material to be broadcast over WDKD; and (4) because Robinson had marshalled "a formidable expression of community support for the retention of his station's license" (Concls. 18-24, J. A. 279-284).

However, since the Examiner (unlike the Commission) was precluded for procedural reasons from imposing any in-between penalty, since a token penalty would not suffice, and since this case must stand as a warning to others under the Commission's new "get-tough" program policies, the Examiner felt that these considerations overrode those running in favor of a renewal (Concl. 27, J. A. 287).

On exceptions thereto the Commission in a Decision released July 26, 1962 took a quite different view of the case (33 FCC 250; J. A. 288-302). It denied that Issue 3 was "pivotal" (para. 13, J. A. 293), and concluded that Issue 1 was "just as important", and standing alone required a denial (paras. 13, 25, J. A. 293, 301). Then, after denying that its Issue 3 should be equated with obscenity and stating that something less than obscenity was

here sufficient, the Commission concluded that "by any standard" the Walker broadcasts were "flagrantly and patently offensive", "and thus contrary to the public interest" (paras. 22-23, J.A. 298-300)—and that a refusal to renew WDKD's license on that ground impinged on neither the First Amendment nor the "no-censorship" prohibitions of the Communications Act (47 U.S.C. Sec. 326); citing as authority therefor two early decisions of the court below (paras. 20, 22-23, J. A. 297-300).[1] Although of the view that a short-term renewal might be more appropriate with respect to the deficiencies found in connection with Issues 2 and 4, nevertheless when coupled with the conclusions which it had reached under Issues 1 and 3, the Commission deemed the "death penalty" was required here (paras. 16, 24-25, J. A. 295, 300-301).

On appeal to the court below, Robinson contended, under recent decisions of this Court, (1) that any delving by the Commission into "program content", in areas (as here) where that agency can point to no standard more specific or substantive than "public interest, convenience, and necessity", violates the free speech guarantees of the First Amendment and the "no-censorship" prohibitions of 47 U.S.C. Sec. 326 (App. Br. pp. 13-26, App. Reply Br. pp. 1-16); and (2) that the Commission in this case had clearly delved into program content in connection with Issues 2, 3, and 4, and to a lesser degree in connection with Issue 1, and had read broader denials into Robinson's letter of June 10, 1960, than were warranted by the language there used (App. Br. pp. 26-48; App. Reply Br. pp. 16-22).

In a *per curiam* opinion, Chief Judge Bazelon and Judge Washington affirmed the Commission's action refusing to

[1] *KFKB Broadcasting Ass'n v. Federal Radio Commission*, 60 App. D. C. 79, 47 F. 2d 670 (1931); *Trinity Methodist Church, South v. Federal Radio Commission*, 61 App. D. C. 311, 62 F. 2d 850 (1932), cert. den. 284 U. S. 685 (1932), 288 U. S. 599 (1933).

renew WDKD's license solely on the misrepresentation issue (Issue 1), and accordingly reached "no other questions" (Appendix, p. 4A). In a separate concurrence, Judge Miller voted to affirm *in toto* (Appendix, pp. 5A-7A).

In connection with the court's subsequent rejection of a request for an *en banc* hearing, Judge Wright filed a separate opinion (Appendix, pp. 9A-12A), stating that, in his view, a majority of the court hearing this case had not endorsed "program content regulation", and deemed *en banc* review unnecessary inasmuch as the Commission to date has been relatively circumspect in examining into program content, as evidenced by intervening action in *Pacifica Foundation*, 1 RR 2d 747 (1964).

Reasons for Granting the Writ

I

1. In substantiation of its asserted authority to delve into program content and to terminate WDKD's license because of offensive material theretofore broadcast, the Commission expressly relied upon two early decisions of the court below (J.A. 297), namely, *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 60 App. D. C. 79, 47 F. 2d 670 (1931) and *Trinity Methodist Church, South* v. *Federal Radio Commission*, 61 App. D. C. 311, 62 F. 2d 850 (1932), cert. den. 284 U. S. 685 (1932), 288 U. S. 599 (1933). The rationale of those cases is in conflict with more recent decisions of this Court:

It cannot be gainsaid that where administrative agencies, in the exercise of their licensing functions, "judge the content of the words and pictures sought to be communicated", the safeguards of the First Amendment become applicable save in the exceptional case. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503. A violation of the First Amendment arises where a government agency

"undertakes to censor the contents of the broadcasting". *Kovacs v. Cooper*, 336 U. S. 77, 97 (Jackson, J. concurring). "The term censorship . . . connotes *any* examination of thought or expression in order to prevent publication of 'objectionable material'". *Farmers Union v. WDAY, Inc.*, 360 U. S. 525, 527 (emphasis by the Court). In short, the decisions to date of this Court sustaining restrictions on freedom of speech and press, whether by licensing or other methods, "do not deal with the *content* of the speech; they deal only with the conditions surrounding its delivery". *Time Film Corp.* v. *Chicago*, 365 U. S. 43, 78 (emphasis in the original, per Warren, C. J., Black, Douglas, and Brennan, J.J., dissenting).

Even more directly in point are this Court's recent pronouncements holding, with First Amendment freedoms needing breathing space to survive, that government may regulate in this area "only with narrow specificity". *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 432-433, 438; *Smith* v. *California*, 361 U. S. 147, 150-151; *Speiser* v. *Randall*, 357 U. S. 513, 526; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *N.A.A.C.P.* v. *Alabama*, 12 Law Ed. 2d 325, 338. Precision must be the touchstone of legislation affecting basic freedoms. *Aptheker* v. *Secretary of State*, 12 Law Ed. 2d 992, 998-999, 1002-1004; *Baggett* v. *Bullitt*, 12 Law Ed. 2d 377, 385-386. As well stated in *United States* v. *International Union*, 352 U. S. 567, 596 (per Douglas, J. dissenting):

> When the exercise of First Amendment rights is tangled with conduct which government may regulate, we refuse to allow the First Amendment rights to be sacrificed merely because some evil may result. Our insistence is that the regulatory measure be "narrowly drawn" to meet the evil that the government can control.

Accordingly, "stricter standards of permissible statutory vagueness may be applied to a statute having a par-

ticularly inhibiting effect on speech". *Smith* v. *California*, 361 U. S. 147, 151. As this Court there said (pp. 150-151):

> Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.

As a consequence, broad standards such as "good character", "general welfare", "sacrilegious", and "public interest", though specific enough in some contexts, lack sufficient specificity where government by such portmanteau words seeks to regulate evils intertwined with First Amendment freedoms. *Staub* v. *Baxley*, 355 U. S. 313; *Butler* v. *Michigan*, 352 U. S. 380, 383; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 502; Sullivan, "Editorials and Controversy: The Broadcaster's Dilemma", 32 *Geo. Wash. Law Rev.* 719, 721 (1964).

Hence, it does not follow from the mere fact that the broad standard of "public interest, convenience, and necessity" has been sustained in situations where the Commission has denied licenses on interference grounds, that such a standard (which must be read *in pari materia* with the "no-censorship" prohibitions of Section 326 of the same statute), is sufficiently precise when the Commission attempts *thereunder* to delve into program content and to deny licenses because of "over-commercialization", "too much shooting", "not enough religion", or "too much sex". If those matters are current evils of such moment that this Court would sustain a "narrowly drawn" *Congressional* enactment in this field, as not itself impinging on First Amendment freedoms, it seems patent that the general touchstone of "public interest" is far too broad to warrant any delving into program content thereunder by an administrative agency which is expressly

precluded by 47 U.S.C. Sec. 326 from interfering with free speech either on a case-by-case basis or by general regulation.

In short, where the Commission examines into program content under a standard no more specific and no more substantive than "public interest",[1] with this Court on record that it has not condoned, because of the guarantees of the First Amendment, *any* delving into program content, and with this Court insisting on narrowly drawn rather than dragnet legislation where First Amendment rights are entangled with evils which Congress may in some degree regulate, its actions are improper.[2]

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[1] See *Head* v. *Board of Examiners*, 374 U.S. 424 where Commission counsel relied on the same cases it did in the court below for the proposition that it has exclusive jurisdiction over programming and advertising *content* (No. 232), and where this Court in commenting on that convention in another context said (p. 431): "*Assuming this to be a correct statement of the Commission's authority* [i.e., that the Commission may consider and regulate advertising content], we are nevertheless not persuaded . . . The nature of the regulatory power given to the federal agency convinces us that Congress could not have intended its grant of authority to supplant all the detailed state regulations of professional advertising practices [by optometrists], particularly when the grant of power was accompanied by *no substantive standard other* than the 'public interest, convenience and necessity'". (Emphasis supplied)

[2] This is not to say, in program areas where Congress has already legislated with requisite specificity and where the Commission proceeds under those specific standards, and not (as here) under the general touchstone of "public interest", that the Commission may not look at programming or even at program content not within the ambit of the First Amendment's protection. For example, in 47 U.S.C. Sec. 312, Congress has expressly authorized the Commission to revoke licenses for broadcasting of "obscenity", "lotteries", and "fraud by radio", and to issue cease and desist orders against any licensee who has violated or failed to observe those criminal provisions, with a further right to revoke a license for any subsequent violation of a final cease and desist order issued in connection therewith. Elsewhere in the Act (47 U.S.C. Secs. 315 and 317), Congress has laid down explicit "equal time" requirements concerning "political broadcasts", and made sponsorship

2. Though the foregoing teachings of this Court, at least in related free speech areas, seem reasonably clear, the Commission contended below (and until this Court speaks directly on the subject will doubtlessly continue to so contend) that radio and television are somehow different—adverting to the impact of radio and television on housewives and teenagers (FCC Br. p. 23), to a scarcity of frequencies (FCC Br. pp. 50-51), and to a statement in *Burstyn* that each media of communications has "its own peculiar problems" (FCC Br. pp. 52-56).[1] Not dissimilar contentions were in fact squarely rejected in *Burstyn* when this Court said (343 U. S. 495, 502):

> It is further argued that *motion pictures* possess a greater capacity for evil, particularly *among the youth* of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures would be disqualified from First Amendment protection. If there be capacity for evil it may be *relevant* in determining the *permissible scope* of community control, but it does not authorize substantially unbridled censorship such as we have here (under the vague standard of "sacrilegious"). (Emphasis supplied).

In short, in view of the Commission's contentions that "radio is somehow different", it is high time that this

identification announcements mandatory. If the Commission were to examine into programming and revoke a license under those explicit provisions of the Act, it would be proceeding under specific statutory provisions which Congress has enacted covering those particular matters, and not under a broad "public interest" standard which this Court has indicated lacks sufficient specificity where First Amendment rights are involved.

[1] Though contending that the Commission can delve into program content in the field of radio and television under a broad "public interest" standard, Commission counsel frankly recognized in their brief below that such action would not be permissible under doctrines enunciated by this Court in recent free speech cases dealing with other (non-radio) instrumentalities for communicating thoughts and ideas (FCC Br. pp. 22, 52, 54, 55, 56).

Court make it clear that a broad standard inadequate in other free speech contexts cannot be applied in the radio and television field any more than in other fields, when it impinges on basic commands of the First Amendment, until Congress first legislates with specificity on that score, bearing in mind that even the powers of Congress are highly restricted in this particular area.[1]

With the Commission continuing to rely on *KFKB*, with Judge Miller citing *KFKB* with approval, and with Judges Bazelon, Washington and Wright neither repudiating nor reaffirming *KFKB*, some 5500 broadcasters, the Commission, the Congress, and the general public know not whether the Commission's attempts to delve into program content, in situations where its reliance is solely on the standard of "public interest", are or are not lawful. The matter is obviously one of great importance on which this Court has not but should squarely speak.

3. Since jurisdiction to review all Commission decisions revoking or refusing to renew broadcast licenses is vested by Congress in the District of Columbia Circuit and in that Circuit only (47 U.S.C. Sec. 402(b)), the relatively

[1] When one realizes that this Court has never squarely held that the guarantees of the First Amendment extend to radio and television, though it has repeatedly indicated such coverage by well-considered dicta, the Commission's recent assertions that it can delve into "program content" and revoke licenses under a standard no more specific or substantive than the "public interest", is indeed worrisome. And with all deference to Judge Wright and his reference to *Pacifica*, the fact that present-day Commissioners may be well intentioned and that they may have been reasonably circumspect to date in their forays into program content (Appendix, p. 12A) is not comforting where electronic journalism is in the meantime being accorded fewer First Amendment safeguards than other media of mass communications. As Professor Sullivan has pointed out in an article entitled "Editorials and Controversy: The Broadcaster's Dilemma", 32 *Geo. Wash. Law Rev.* 719, 722 (1964), "When the *Palmetto* and *Pacifica* decisions are read together, one can consider only that the Commission still views the first amendment rights of broadcast licensees as 'considerably different from the rights of other media of mass communications'".

narrow, though highly important First Amendment, no censorship, and delegation problems here presented cannot arise, at least directly, in other Circuits. Thus, with a conflict of Circuits not likely to occur and with the court below refusing either to reaffirm or repudiate *KFKB* (the decision on which the Commission bottoms its alleged right to pass on "program content"), the matter of that agency's authority to engage in program censorship is one which should at long last be considered and clarified by this Court.

II

If the Commission exceeded its authority in examining into program content, the alternative reason it there gave for terminating WDKD's operating authority (alleged misstatements by the licensee) does not support or justify the drastic death penalty there imposed.

1. Where basic constitutional rights are involved, neither the findings of a state court nor those of a federal administrative agency, which is investigator, prosecutor, judge, and jury, "are insulated against examination here". *Kee* v. *California*, 374 U. S. 23, 33-34; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 52; *New York Times Co.* v. *Sullivan*, 11 Law Ed. 2d 686, 709; *Staub* v. *Baxley*, 355 U. S. 313, 318-320.

As documented in briefs below and not disputed in the *per curiam* opinion (cf. Petition for Rehearing, pp. 6-12, 15-16), any finding that Robinson misrepresented facts to the Commission prior to the institution of the hearing (Issue 1) must stand or fall on what was said (or left unsaid) in a *single* written document, i.e., Robinson's letter of June 10, 1960 (WDKD Ex. 6, J. A. 13) replying to the Commission's inquiry of May 11, 1960 (WDKD Ex. 3, J. A. 9; J. A. 340-342).

The June 10 letter, if read according to its logical tenor and in line with what Robinson there intended (J.A. 339,

342, 343-344, 387-388), constituted a denial by Robinson that he had any prior knowledge of the *eight* items (statements) from Walker's taped shows which Robinson's Washington attorney had forwarded to him on June 8, 1960 (WDKD Ex. 5, J. A. 11-12). Throughout that letter, as borne out by an affidavit of the same date (WDKD Ex. 7, J. A. 14), "the statements" and "these statements" were used interchangeably by Robinson and his Kingstree attorney to refer to the eight statements (quotations) set forth in Mrs. Ehrig's letter of June 8. When thrice queried at the subsequent hearing on the intended scope of the denial contained in the June 10 letter (WDKD Ex. 6), Robinson testified that the June 8 letter setting forth the eight quotations was the basis for the statements contained in his letter of June 10 (Tr. 146, J. A. 339; Tr. 150, J. A. 342); that the June 8 letter provided him with his first information concerning those "particular items" (Tr. 153, J. A. 343-344; cf. Tr. 150, J. A. 342; Tr. 151, J. A. 343); that his letter and affidavits to the Commission addressed themselves to the "particular statements" contained in Mrs. Ehrig's letter of June 8 and "not to the *overall nature* of Charlie Walker's program" (Tr. 154, J. A. 344; cf. Tr. 214-215, J. A. 387-388).

Nowhere in the Commission's final decision nor in its briefs below was it asserted or contended that the evidence submitted at the subsequent hearing in any way proved that Robinson had prior knowledge of those *particular* quotations.

On what theory then did the Commission conclude that Robinson in his June 10 letter was guilty of deliberate misstatements so serious in nature as to reflect on his character to the point that he can no longer be entrusted with a broadcast license?

The Commission reached that result, first by construing Robinson's June 10 disavowal of prior knowledge as extending to everything Walker had ever uttered, rather

than restricting it to the eight taped items there discussed. Then, since Robinson candidly admitted at the hearing that he was familiar with various punning or assonant epithets which Walker applied to nearby towns, epithets which in the Commission's view were "flagrantly and patently offensive" (J. A. 299-300), e.g. Walker's reference to Greeleyville as Greasy Thrill, Bloomville as Bloomersville, St. Stephens as St. Stevens, Monk's Corner as Monkey's Corner, Georgetown as Stinkumville, the Commission deemed Robinson guilty of misrepresenting facts to that agency.

However, as the record shows, those epithets were not of Walker's coinage and were in common use in the Kingstree area (J. A. 604). Though Robinson was aware that these appellations might offend sponsors or property owners in Monk's Corner or Georgetown and on numerous occasions remonstrated to Walker on that score, it is quite evident that Robinson did not consider these references to various towns as "coarse or vulgar" (J. A. 333, 384-385, 388, 392-394, 399, 449-451). The Commission and its trial counsel thought otherwise. They persisted in contending that these assonant epithets, though in common use in this "Tobacco Road" area of South Carolina, were in fact "coarse and vulgar" and continued to catalog them as such in FCC Ex. 2 (J. A. 197-206). Thus, though the Commission's general counsel in his brief in the court below all but conceded that these appellations cannot be so regarded (FCC Br. pp. 28, 36), the Commission itself viewed those admissions quite differently—as proof positive that Robinson's June 10 letter was grossly false. In short, the Commission's conclusion with respect to Issue 1, only slightly less than its conclusions under Issues 2, 3, and 4, is tainted by an unauthorized evaluation of program content.

Hence, the claim of misrepresentation advanced by the Commission as a second reason for terminating WDKD's

operating authority stems from its action analyzing content and placing on the June 10 letter a broader disavowal than the language there used required and one not there intended. Thus, the instant finding of misrepresentation is indeed a slender reed on which to justify the admittedly drastic death penalty which the Commission here imposed (para. 23, J. A. 299), especially in a proceeding instituted after Congress in 1960 provided the Commission with an in-between arsenal of sanctions more commensurate with the gravity of the alleged misrepresentation offense. See *Head* v. *Board of Examiners*, 374 U. S. 424, 434-436 (per Brennan, J. concurring).

2. Even if the evidence on which the Commission predicated its charge of misrepresentation was less questionable and wholly untainted by any examination into program content, it cannot be denied that the instant hearing arose out of suggestive material contained on tapes of Walker's broadcasts which a competing station had already supplied the Commission. Nor can it be denied that the Examiner, after hearing all the evidence thereafter adduced, was of the view that "the pivotal issue in this case is issue three" (Concl. 1, J. A. 264).

Although the Commission disagreed with its Examiner on this point by subsequently stating in an "institutional" decision that either Issue 1 or Issue 3, standing by itself, rendered a death penalty mandatory, it must be borne in mind that the Commission, because of the two early decisions of the court below, deemed its power to pass judgment on program content to be unquestionable and that WDKD's license clearly had to be terminated on that score. It was easy enough, therefore, for the Commission to "shore up" the result by asserting at that point that WDKD's license should likewise be terminated for misrepresentation.

If, as we contend, the Commission is foreclosed by the First Amendment and by 47 U.S.C. Sec. 326 from passing

judgment on program content absent a more "narrowly drawn" standard than the touchstone of "public interest" under which the Commission was here proceeding, the instant case should as a minimum have been remanded by the court below to the Commission, thus affording that agency an opportunity to consider the misrepresentation matter by itself, completely divorced from other facets of this case, and to determine in all justice whether the assertions contained in the June 10 letter do in fact so reflect on Robinson's character as to render him an unfit licensee.

3. Furthermore, the proneness of the Federal Communications Commission to impose its own programming views on its licensees by techniques which do not readily admit of judicial review [1] has become so notorious as to call for corrective action—if the Commission is in fact exceeding its constitutional and statutory authority in this area under a standard no more specific and substantive than "public interest, convenience, and necessity". The Commission's penchant on this score and the consequences thereof, as set forth *a propos* this very case in a recent Note, "Regulation of Program Content by the FCC", 77 *Harv. Law Rev.* 701, 712 (February 1964), bear quotation:

> In *Palmetto Broadcasting Co.*, the FCC opened up a new and potentially far-reaching area of concern for

[1] The Commission in its 1946 report entitled "Public Service Responsibility of Broadcast Licensees" (better known as the "Blue Book") discoursed at length on its purported authority in this field—in a document not subject to judicial review. See *Hearst Radio* v. *Federal Communications Commission*, 83 U.S. App. D. C. 63, 167 F. 2d 225 (1948). Other favorite nonreviewable techniques for making its program views felt are utterances in speeches by individual Commissioners, and letter inquiries addressed by the Commission and its staff to individual licensees concerning every imaginable facet of their programming—techniques which have given rise to regulation by "lifted eyebrow". See Justice Brennan's separate opinion in *Head* v. *Board of Examiners*, 374 U. S. 424, 437 fn. 8 and authorities there cited.

> specific program content. In that case, the Commission refused to renew the license of a station which broadcast material that, while not obscene, was "offensive or patently vulgar". Although, *as is typical*, other grounds existed for the Commission's action in *Palmetto*, the *nub* of the case appears to be the program content; the allegedly offensive jokes were carefully analyzed by both the FCC examiner and the Commission. This new venture into the realm of qualitative content regulation presents a strong test of the constitutional, statutory, and administrative limitations on FCC authority in the content area. The court of appeals, in reviewing *Palmetto*, may uphold the Commission's action on some of the alternative grounds of decision. In this event, the limits on FCC authority will remain unclear, and its action in *Palmetto* may prove a successful feint of regulation, whereby the FCC can affect program content even when it may not actually have authority to do so . . . [footnotes omitted and emphasis supplied].

Thus, for the court below and for this Court to "duck" the real "nub" of this case may all be very well, if the Commission in fact has the censorship powers ascribed to it by Judge Miller. However, if there be merit in the First Amendment, no censorship and delegation matters which petitioner is asking this Court to review, it should be borne in mind that the Commission is here exercising authority which Congress did not delegate (in view of 47 U.S.C. Sec. 326) and could not delegate except with "narrow specificity" (in view of the First Amendment and this Court's pronouncements requiring specific standards where regulatory activities could otherwise impinge on First Amendment freedoms). In short, for the judiciary not to set the Commission straight on its limited role in the program field is indirectly to sanction "lawless" action. The matter is one of sufficient importance to warrant the exercise by this Court of its supervisory authority.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

JAMES A. MCKENNA, JR.

VERNON L. WILKINSON

MCKENNA & WILKINSON
1735 DeSales Street, N. W.
Washington, D. C.
20036

Counsel for Petitioner

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